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IV. ‘SHARED RESPONSIBILITY’: STOPPING THE IRRESPONSIBILITY CAROUSEL  
FOR THE PROTECTION OF PUBLIC INTERESTS IN INTERNATIONAL  
INVESTMENT LAW

STEPHAN W SCHILL\*

**A. Introduction**

The interaction between private and public in international investment law and investor-state arbitration also raises the question of who should be responsible for deciding the boundaries between both, about where to draw the line between investor rights and public interests. Depending on the perspective, this involves either the question of who should ultimately determine the scope of protection of private rights against illegitimate public interference, or who should ensure that legitimate public interests are protected and not hampered due to an over-expansive protection of investor rights. The latter perspective has given rise to the large majority of concerns in the current debates about the ‘legitimacy crisis’ in international investment law<sup>30</sup> and the future of the investment regime.<sup>31</sup> For this reason, it constitutes the focus of the following remarks. Yet this perspective is also the more interesting one. While it is clear that investment treaties and investment treaty tribunals are given responsibility to protect foreign investors, potentially together with the investor’s home state exercising diplomatic protection, it is less clear who is responsible for protecting competing public interests under the existing investment regime and who should be responsible under the future rules that are being considered in the various reform initiatives in the field.<sup>32</sup>

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<sup>30</sup> See Charles N Brower and Stephan W Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 *Chicago Journal of International Law* 471, 473 (with further references).

<sup>31</sup> See, inter alia, Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press, 2013); Armand De Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge Chapman & Hall, 2012); José E Alvarez, Kamil Gerard Ahmed, Karl Sauvant and Gabriela del P Vizcaino (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011); Jean E Kalicki and Anna Joubin-Bret (eds), ‘Reform of Investor-State Dispute Settlement: In Search of A Roadmap’ (2014) 11 *Transnational Dispute Management* (TDM Special); Karl P Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland, 2013).

<sup>32</sup> See eg the work done by the United Nations Conference on Trade and Development (UNCTAD). UNCTAD, *World Investment Report 2012—Towards a New Generation of Investment Policies* (United Nations Publication, 2012) 97ff; UNCTAD, *World Investment Report 2013—Global Value Chains: Investment and Trade for Development* (United Nations Publication, 2013) 110ff; UNCTAD, *World Investment Report 2014—Towards a New Generation of Investment Policies* (United Nations

Potential candidates for the responsibility to protect public interests are arbitral tribunals, home states, host states, or international organisations active in the field of foreign investment. Yet when considering who is responsible—both *de lege lata* as well as *de lege ferenda*—we face a significant collective action problem that arises out of the decentralised structure of international investment law and investor-state arbitration, in which every class of actors is able to pass on the responsibility for protecting public interests to another class of actors. To address this collective action problem, I suggest having recourse to the idea of ‘shared responsibility’ of all actors involved in protecting public interests. This concept is not used in the technical sense of the law on state responsibility or the responsibility of international organisations as referring to the secondary norms governing the consequences of a breach of international law, but rather to indicate that we need to develop conceptual approaches that allow us to consider primary obligations for the protection of public interests that no class of actors in the international investment regime can escape.<sup>33</sup>

In the following remarks, I will not deal in detail with how the idea of shared responsibility should be operationalised in international investment law. I will only present its contours and the *problématique* to which it reacts. For this purpose, I will first turn to the characteristics of the structure of the investment regime: while it is decentralised and heterarchical, it nevertheless has significant governance effects that are able to impact public interests and, therefore, are in need of protection. Second, I will turn to the difficulties the decentralised structure poses in attributing responsibility for the protection of public interests from a practical point of view: it can result in what I call an ‘irresponsibility carousel’ that makes it difficult, if not impossible, to hold a specific class of actors, or in fact any actor, responsible for protecting the public interest. Finally, I will introduce the idea of ‘shared responsibility’ as a solution to conceptualise the duty of all actors involved to protect public interests.

## B. Governance Structure of International Investment Law and Impact on Public Interests

Analysing who should decide about the protection of public interests is closely connected, and has to respond, to the structure of international investment law and investor-state dispute settlement. This structure is decentralised and heterarchical.<sup>34</sup>

Publication, 2014) 126ff. Similarly, the Organisation for Economic Co-operation and Development (OECD) is engaged in reform activities. See eg David Gaukrodger and Kathryn Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ (2012) OECD Working Papers on International Investment 2012/3 available at [dx.doi.org/10.1787/5k46b1r85j6f-en](https://dx.doi.org/10.1787/5k46b1r85j6f-en). For further information on the OECD’s activities in international investment law, see [www.oecd.org/daf/inv/investment-policy/oecdworkoninternationalinvestmentlaw.htm](http://www.oecd.org/daf/inv/investment-policy/oecdworkoninternationalinvestmentlaw.htm).

<sup>33</sup> My use of the notion thus differs from the same notion used by André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *Michigan Journal of International Law* 359, even though I share a similar motivation, namely to address collective action problems.

<sup>34</sup> See Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) 281–93.

The governing law is based largely on bilateral treaties, not a single multilateral framework; it is implemented not by a centralised dispute settlement body but by one-off arbitral tribunals, which are constituted under a variety of institutional rules and apply different rules of procedure;<sup>35</sup> and finally, there is formal review of arbitral decision-making in set-aside or annulment proceedings as well as the enforcement of awards, depending on the applicable institutional rules, which is in the hands of ad hoc annulment committees and/or domestic courts.<sup>36</sup> In international investment law, we therefore face a multi-actor structure, or network, without hierarchical order among the actors and without a clearly discernible centre.

Notwithstanding this decentralised structure, international investment law as a whole, and investor-state arbitration in particular, have governance effects.<sup>37</sup> These effects are due to the fact that decisions and awards by investment treaty tribunals become public, and thereby are able to, and actually do, function as precedents in other investment arbitrations somewhat independently of which investment treaty concretely applies.<sup>38</sup> In addition, the relatively close-knit community of investment arbitrators, which has developed its own epistemic, or interpretive culture, and comprises a core of particularly influential ‘elite arbitrators’,<sup>39</sup> exercises a pull towards

<sup>35</sup> Most investment treaty arbitrations take place under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention). Other procedural rules that regularly apply, depending on the agreement of the parties and/or the consent in an investment treaty, are the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Investment Disputes (ICSID Additional Facility Rules) (latest version effective as of 10 April 2006) reprinted in ‘ICSID Additional Facility Rules’ Document ICSID/11 (April 2006) available at [www.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR\\_English-final.pdf](http://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf), the United Nations Conference on International Trade Law (UNCITRAL) Arbitration Rules (the original 1976 version, the revised version of 2010, and the latest version of 2013 incorporating the UNCITRAL Rules on Transparency for Treaty-Based Investor-State Arbitration are available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html); the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules) (the latest version adopted 1 January 2010 and previous versions, are available at [www.sccinstitute.com/dispute-resolution/rules/](http://www.sccinstitute.com/dispute-resolution/rules/); the Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration Rules) (the latest version in force as of 1 January 2012) are available at [www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/](http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/), or ad hoc arbitration. Cf Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (Oxford University Press, 2012) 238–39.

<sup>36</sup> In arbitrations under the ICSID Convention the only remedy against an arbitral award is an application for annulment pursuant to Art 52 ICSID Convention. ICSID awards have to be recognised and enforced in all member states of the Convention; see Art 54 ICSID Convention. In non-ICSID arbitration, the remedies against arbitral awards depend on the law applicable at the place of arbitration. Recognition and enforcement is usually governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) Art V(2)(b). In this context, domestic courts play a more prominent, but still limited role, as compared to ICSID arbitrations.

<sup>37</sup> See further, Benedict Kingsbury and Stephan W Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (ICCA Congress Series No 14, Kluwer Law International, 2009).

<sup>38</sup> On the use and function of precedent in investment treaty arbitration see Schill (n 34) 321–57.

<sup>39</sup> The classic analysis of the sociological composition of international arbitration has been presented by Yves Dezalay and Bryant G Garth, *Dealing in Virtue—International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996). How the arbitration

convergence, rather than divergence. These factors not only contribute to international investment law constituting a relatively uniform regime for the governance of investor-state relations despite its decentralised structure; they also enable arbitrators as a group to nudge investment treaty jurisprudence in a certain direction.<sup>40</sup> This is all the more important considering that the investment regime exercises pressure on all branches of government at the domestic level to comply with the state's investment treaty obligation by granting monetary compensation and damages in cases of breach.

The governance structure of international investment law raises a number of concerns for the protection of public interests. First, problems for the protection of public interests can arise because of the lack of sufficiently hierarchical and centralised governance structures. After all, the fragmentation of investment law into a myriad treaties and their application by one-off dispute settlement bodies actually creates, or at least risks creating, inconsistencies in and a lack of predictability in the governing law.<sup>41</sup> This can be harmful for the protection of public interests because governments may refrain from regulating in the light of unforeseeable liability risks.<sup>42</sup>

Second, problems for the protection of public interests stem from the asymmetric nature of investment treaties that protect foreign investments against government interference without, in most cases, mentioning host state rights or competing non-economic concerns, and from only giving foreign investors, not host states, nor affected third parties, the right to bring claims for breach of treaty in investment treaty arbitration.<sup>43</sup>

Third, the mechanism of party-appointment of arbitrators leads to different dispute-resolvers than those who would otherwise be appointed in a state-only system.

community's *esprit de corps* translates into legal culture is discussed in Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, 2013). On the structure of the network of arbitrators and the importance of a relatively small number of individuals in this network, see Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 *European Journal of International Law* 387.

<sup>40</sup> On law-making by arbitrators through precedent see Schill (n 34) 332–38.

<sup>41</sup> Examples of such inconsistencies can be found in Schill (n 34) 282–87, 339–55.

<sup>42</sup> On this notion in the context of investment law, see Kyle Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 607; Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (Study prepared for: Minister for Foreign Trade and Development Cooperation [and] Ministry of Foreign Affairs, the Netherlands, Reference: MINBUZA-2014.78850, 2014) paras 66–86, available at [www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf](http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf). Notably, regulatory chill is not necessarily connected to inconsistent decision-making but may result more generally from a lack of clarity in the applicable law, but cases of inconsistent decision-making decrease predictability and therefore increase the potential for governments to refrain from taking action to protect public interests.

<sup>43</sup> On the asymmetric nature of investment treaties, see Jochen von Bernstorff, 'Reflections on the Asymmetric Rule of Law in International Relations' (2010) 3 *Select Proceedings of the European Society of International Law* 381, 382–83; Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 203, 211–12.

It is certainly difficult to argue that the appointment mechanism, as some claim,<sup>44</sup> generally leads to a pro-investor bias in investment treaty arbitration, given that both the state's nominee as well as the chair or president of the tribunal will usually have been appointed with the consent of the respondent.<sup>45</sup> This notwithstanding, the dynamic of a tribunal's decision-making, in particular in deliberations and reasoning, and hence the outcome of a decision, will certainly be influenced by the investor's nominee who may, but need not, be chosen for his preference for private, rather than public interests. Finally, the sociological composition of the group of investment treaty arbitrators, in particular the background of many of them in international commercial arbitration, may be a ground to fear that their decision-making is less public interest-minded than that of tenured judges in national or international courts.<sup>46</sup>

### C. The Irresponsibility Carousel in International Investment Law

All of the above illustrates that the public interests may be significantly affected in international investment law and arbitration. Yet, when considering which actors have a responsibility to protect public interests in international investment relations, the decentralised structure of the regime causes considerable headache. After all, the structure makes it difficult, if not impossible, to pinpoint a specific actor, or a class of actors, that can be effectively held responsible for protecting the public interest. Instead, the decentralised structure of international investment law risks leading to an irresponsibility carousel, where everybody who is asked to assume responsibility for protecting the public interest points to somebody else as being in charge. This is a textbook-like collective action problem.<sup>47</sup>

In fact, we can witness the irresponsibility carousel going round in the current practice of international investment law and arbitration. Some arbitrators and arbitral tribunals, when confronted with the charge of giving too little weight to public interests, may point out that they are only applying the governing law, suggesting that if there is insufficient protection of public interests it is of the contracting states' making. After all, states are responsible for making treaties that only

<sup>44</sup> For this claim, see Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 167–75; Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2007) 627, 628, 648; Pia Eberhardt and Cecilia Olivert, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute, 2012) available at [www.tni.org/files/download/profitfrominjustice.pdf](http://www.tni.org/files/download/profitfrominjustice.pdf).

<sup>45</sup> Susan Franck's work suggests that the claimed bias cannot be sustained when empirically analysing the outcome of investment treaty arbitrations, see Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 *North Carolina Law Review* 1; Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard International Law Review* 436.

<sup>46</sup> For the impact of professional socialisation on decision-making, see Stephan W Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2001) 22 *European Journal of International Law* 875.

<sup>47</sup> See Nollkaemper and Jacobs (n 33) 391–92.

explicitly mention the protection of foreign investment, but hardly refer to competing rights and public interests. Some tribunals even appear to deny responsibility for the entire system of international law and instead emphasise that they are only serving the disputing parties in settling an individual dispute without regard to the overall system.<sup>48</sup> Systemic considerations for the protection of public interests are thus shunned.

Host states whose measures protecting public interests are scrutinised as to their conformity with investment treaty disciplines equally pass on their responsibility for protecting public interests by pointing to the circumstances they are in. Not only do many of them not have well-working domestic institutions that could protect public interests effectively, such as the protection of consumers, the environment, or labour standards; they also point to the structural constraints they suffer due to the decentralised structure of investment law. One such argument emphasises host states' competition in attracting foreign investment with other capital-importing countries. This competition, in turn, is said to lead to a race to the bottom and requires capital-importers to lower the protection of the public interest and restrict taxation.<sup>49</sup> This puts them, they claim, in a weak bargaining position in relation to capital-exporting states and to investors.<sup>50</sup> In this view, it would be home states, through domestic regulation of outward investment, or the international community as a whole, through concluding a multilateral treaty, who are responsible for protecting public interests effectively.

Home states, however, equally do not necessarily feel responsible for taking principal responsibility for protecting public interests. Instead, they may point to host states as the main bearers of responsibility. After all, what constitutes a public

<sup>48</sup> See eg *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16, Award (31 March 2011) para 90: 'The Tribunal has carefully reviewed the pleadings, evidence and legal authorities submitted by the Parties and has relied exclusively on those in the analysis below. This applies in particular to legal authorities, as the Tribunal adheres to the principle that it should remain within the confines of the debate between the Parties. Thus, this Award is a decision in the dispute as pleaded between the Parties, and the Tribunal will not address arguments that have not been raised by them.'

*RosInvestCo UK Ltd v Russian Federation*, SCC Case No V 079/2005, Award on Jurisdiction (October 2007) para 137 stressing that 'it is the primary function of this Tribunal to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions.' Other tribunals, by contrast, stress the importance of embedding their decision-making and reason-giving in a broader framework that aims at creating convergence in investment treaty jurisprudence. See eg *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Provisional Measures (21 March 2007) para 67: 'The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.'

<sup>49</sup> For this argument, see Andrew T Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639. On competition as the driving factor for the spread of BITs see further, Zachary Elkins, Andrew T Guzman and Beth Simmons, 'Competing for Capital' (2006) 60 *International Organization* 811.

<sup>50</sup> For an understanding of investment treaties as expressions of hegemonic behaviour of capital-exporting States, see Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595, 611–12.

interest is normally an internal matter that is for the host state to decide and to implement. Furthermore, unilateral regulation in home states is not necessarily effective in protecting public interests in investor-state relations because investors could escape unilateral home state regulation by moving the home base of problematic investment activities to another jurisdiction without comparably strict regulation of outward foreign investment. Similarly, international organisations active in the field of foreign investment by themselves cannot necessarily act effectively to protect public interests without the necessary competences and support of their respective Member States, as these are themselves home and host states of foreign investment activities. They may not only have opposing interests, but may make each other responsible for closing the gaps in the protection of public interests. This irresponsibility carousel must be stopped in order to effectively protect public interests. The question is how.

#### **D. Shared Responsibility to Protect Public Interests**

One way to stop the irresponsibility carousel would be to destroy the decentralised system as it exists altogether and to replace it with more centralised structures, both in substance and procedure. A multilateral treaty combined with a permanent international investment court would achieve that aim. While a multilateral regime would indeed be attractive in providing uniform rules for investor-state relations worldwide, the prospects that such an ambitious project will see the light of day any time soon are dim. The creation of a multilateral investment treaty has failed repeatedly in the not-too-distant past, first in the Organisation for Economic Co-operation and Development's (OECD's) Multilateral Agreement on Investment in the late 1990s, and later on as part of the Singapore Issues in the World Trade Organization (WTO).<sup>51</sup> The closest we are currently likely going to get to multilateralism is through a consolidation of BITs into mega-regionals, such as the Trans-Pacific Partnership (TPP) or the Transatlantic Trade and Investment Partnership (TTIP), currently under negotiation.<sup>52</sup> This does not mean that multilateral approaches on some aspects of investment law are not possible. The Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the United Nations General Assembly on 10 December 2014, which will introduce broad transparency rules into investment treaty-based arbitrations, independently of the applicable institutional rules, is an example.<sup>53</sup> However, more general multilateral reform projects are likely to require many more years to ripen.

Another way, and one that is more immediately effective, is to develop conceptual approaches that are able to ensure accountability and responsibility for the protection of public interests already in the existing structure and to explore whether and how such approaches can be brought to bear as part of the law that already exists

<sup>51</sup> See Schill (n 34) 49–60.

<sup>52</sup> See *ibid* 49–60.

<sup>53</sup> UNGA Res 69/116 (10 December 2014) UN Doc A/RES/69/116.

and in the context of existing investment treaty negotiations. A concept that, in my view, could address responsibility and accountability successfully in a decentralised system and provide a remedy against the irresponsibility carousel is the concept of ‘shared responsibility’.

Instead of asking who among several actors and institutions is responsible for protecting public interests, this concept posits that in principle all actors and institutions bear responsibility for achieving policy goals that are in the common interests of all actors, such as the protection of public interests, be it the environment, human rights, labour standards, public health and morals, or international peace and security. The idea of shared responsibility prevents individual actors, or classes of actors, from denying responsibility for protecting public interests by pointing to alternative addressees who should be in charge. Instead, the concept of shared responsibility requires them to work jointly in achieving a common goal or public policy, which is the protection of public interests through mutual support and mutual control.

Certainly, the idea of ‘shared responsibility’ is not yet mainstreamed in international law and global governance theory. This notwithstanding, it is actively being developed in the light of the need to prevent harm to affected rights and interests in the context of coordination and joint action of international actors to meet certain common policy goals. André Nollkaemper’s project on Shared Responsibility in International Law (SHARES), for example, spearheads efforts to adapt the law of international responsibility, of states as well as international organisations, so as to deal more effectively and fairly with injury caused to third parties by joint activities of international actors through the concept of ‘shared responsibility’.<sup>54</sup>

Yet the idea of ‘shared responsibility’ does not only resonate in connection with the law of international torts. It also falls on fruitful ground as a concept to address the interrelationship of independent public actors that operate under a common governance regime, which aims at achieving certain policy goals but does not impose hierarchical structures among those actors. An example of such a situation can be found in the context of the EU, where both EU organs and Member States act jointly in order to achieve common European policy goals without the existence of a hierarchical order among Member States and in relation to the EU.

Rather, EU organs and Member States interact in what many scholars of EU constitutional law, in particular in Germany, conceptualise as a ‘composite structure’ (*Verbund*).<sup>55</sup> This concept highlights the autonomy of the actors at different levels (EU and national) and transcends ideas of supra- and subordination, while stressing their mutual dependence and the need to cooperate in order to be able to achieve common goals.<sup>56</sup> The need to cooperate, in turn, corresponds to a duty of both

<sup>54</sup> See Nollkaemper and Jacobs (n 33); André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014).

<sup>55</sup> See Christoph Schönberger, ‘Die Europäische Union als Bund’ (2004) 129 *Archiv des öffentlichen Rechts* 81 (with further references). For a similar view outside Germany, see Leonard FM Besselink, *A Composite European Constitution* (Europa Law Publishing, 2007); Luis I Gordillo, *Interlocking Constitutions—Towards an Interordinal Theory of National, European and UN Law* (Hart Publishing, 2012).

<sup>56</sup> Eberhard Schmidt-Aßmann, ‘Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts’ in Eberhard Schmidt-Aßmann and Bettina Schöndorf-Haubold (eds),

the EU and its organs, on the one hand, as well as Member States, on the other, to exercise what Piet Eeckhout calls ‘limited and shared jurisdiction’ in the context of an integrated legal system.<sup>57</sup> While every actor in that system continues to exercise jurisdiction according to its own rules and mandates, this jurisdiction is limited to the extent that the norms at stake are shared with other systems and actors in order to avoid conflicts and incoherence across actors. Limited and shared jurisdiction, therefore, comprise the idea of a duty to further and to protect what is in the common, or public interest.

Similar considerations as those developed in the context of multi-actor action in international law and multi-level governance are also informative when asking which actors in international investment law should protect public interests. The idea of shared responsibility suggests that all actors—tribunals, host states, home states, international organisations, and the international community as a whole—bear responsibility for protecting public interests.

The form that action of each class of actors can take, of course, differs. Host and home states can recalibrate investment treaties in order to meet their responsibilities towards clarifying the fact that investment protection cannot unduly restrict governments’ policy space to protect public interests.<sup>58</sup> Similarly, they can enter joint interpretations of existing investment treaties to that effect, in particular where investment tribunals do not sufficiently take account of public interests in their decision-making practice.<sup>59</sup>

Arbitral tribunals, in turn, can make use of interpretative techniques that integrate the protection of public interests into their decision-making,<sup>60</sup> such as proportionality analysis,<sup>61</sup> and exercise appropriate degrees of deference vis-à-vis government action that is taken to pursue non-investment public interests.<sup>62</sup> Finally, international

*Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005) 1, 6ff; Andreas Voßkuhle, ‘Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund’ (2010) 6 *European Constitutional Law Review* 175, 183–84.

<sup>57</sup> Piet Eeckhout, ‘Human Rights and the Autonomy of EU Law: Pluralism or Integration?’ (2013) 66 *Current Legal Problems* 169.

<sup>58</sup> On this recalibration, see José E Alvarez, ‘Why Are We “Re-calibrating” Our Investment Treaties?’ (2010) 4 *World Arbitration and Mediation Review* 143.

<sup>59</sup> On the dual role of states as parties to disputes and makers of the applicable law, see Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law* 179.

<sup>60</sup> For public interests protected under international law, the principle of systemic integration contained in the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 31(3)(c) is of particular importance in this context, see Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279.

<sup>61</sup> See Benedict Kingsbury and Stephan W Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality’ in Schill (n 44) 75; Alec Stone Sweet, ‘Investor-State Arbitration: Proportionality’s New Frontier’ (2010) 4 *Law and Ethics of Human Rights* 47; Erlend Leonhardsen, ‘Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration’ (2012) 3 *Journal of International Dispute Settlement* 95; Caroline Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15 *Journal of International Economic Law* 223.

<sup>62</sup> See further, Stephan W Schill, ‘Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review’ (2012) 3 *Journal of International Dispute Settlement* 577.

organisations, to the extent covered by their mandate, could assist states and tribunals in taking action to protect the public interest, for example, through assistance in concluding public interest friendly investment treaties,<sup>63</sup> or in developing soft law instruments that can help to conduct investor-state arbitrations in a public interest friendly manner or to interpret and apply investment treaties in such a manner.<sup>64</sup>

## E. Conclusion

To conclude, what all actors in the international investment regime need to appreciate fully is that they do not only deal with interests that are specific to individual disputes or to specific bilateral treaty relationships. Instead, every investment treaty concluded, and every investment treaty dispute settled, not only serves the immediate interests of those involved, but has effect on a global level as part of a global governance structure for investor-state relations. This structure does not serve the protection of private investors for their own sake, but ultimately aims at enhancing prosperity and well-being in all countries that participate in the global investment regime because an appropriate level of investment protection is necessary for global markets to work and create growth and welfare effects.

Accordingly, the goal of the investment regime to protect private investment, while ensuring that the pursuance of non-investment public interests is not hampered, is not a private aim for private gain but is of itself in the public interest. In order to live up to the expectations and exigencies of this system, all actors in international investment law, that is, arbitral tribunals and home and host states, as well as international institutions, are subject to a shared responsibility in protecting both investment and non-investment public interests.

<sup>63</sup> One example is UNCTAD's Investment Policy Framework for Sustainable Development. See UNCTAD, *World Investment Report 2012—Towards a New Generation of Investment Policies* (United Nations Publication, 2012) 97; see further the dynamic version of the framework on UNCTAD's website at [investmentpolicyhub.unctad.org/ipfsd](http://investmentpolicyhub.unctad.org/ipfsd).

<sup>64</sup> On the potential of soft law in international investment law, see Marc Jacob and Stephan W Schill, 'Going Soft: Towards a New Age of Soft Law in International Investment Law?' (2014) 8 *World Arbitration and Mediation Review* 1.